ALLAHABAD HIGH COURT

Muhammad Siddiq

Vs.

Muhammad Nuh

(Sulaiman, J.)

27.01.1930

JUDGMENT

Sulaiman, J.

1. This is a defendants appeal arising out of a suit for damages on the ground for breach of a covenant for title and quiet enjoyment. It is now an admitted fact that four annas share was in the possession of Mt. Badam Kunwar which had been originally acquired by her deceased husband, Ajodhia Prasad. On 17th February 1877 she along with her husband's brother and nephew and her own daughters executed a sale deed of this share in favor of Abdul Majid in the name of his wife, Mt. Wahidunnisa (p. 23). She asserted in the deed that she was the absolute owner of the property and had full power to transfer it, and this assertion was accepted by the other executants. There was also a recital in this document that a sum of ₹ 5,000, which was the sale consideration, had been required by her for various necessities. It is an admitted fact that Abdul Majid had owned the remaining twelve annas share in the three villages in dispute. Thus after 1877 Abdul Majid became the sole owner of the entire villages. On his death some dispute arose between his heirs which resulted in a compromise decree dated 31st January 1890(p. 29). Under this decree the property was divided among his various heirs in this way: that the whole estate was split up into 80 sihams out of which 40 sihams went to Wahidunnisa, 12 sihams to his daughter Hamidunnisa, and the remaining 28 sihams to four ladies, Hikmatunnisa, Niamat Bibi, Anisunnisa and Azmatunnisa. The widow appears to have got more than her legal share, presumably on account of her dower debt remaining outstanding. It is noteworthy that in this compromise decree there was no reference to the previous sale of 1877, nor to the fact that Abdul Majid had acquired four annas share from a Hindu widow, Mt. Badam Kunwar.

2. On 6th March 1891 a sale deed was executed by the four ladies mentioned above of their 28 sihams in favor of a stranger, Bishun Dat, for ₹ 15,000. This covered the entire interest which the four ladies had in three villages. The deed as it stands contained a clear covenant for title as well as quiet enjoyment, and provided that if any part of the whole of the property sold was claimed and found to be the property of anyone else, or if the vendee had to pay anything as costs or damages on account of any rate by anyone else, then in any and every case the vendors, their heirs and representatives and executors, jointly and severally, as well as their movable and immovable properties, would be liable for the costs, damages and loss. So far as this deed went it did not refer to the sale of 1877 and merely referred to the compromise decree of 1890, which in

itself had contained no reference to that sale of 1877. The sale to Bishun Dat was pre-empted by Mt. Wahidunnisa, and her suit resulted in a decree for pre-emption on 30th November 1892.

3. Mt. Badam Kunwar appears to have remained alive for a very long time, and some years after her death a suit was instituted by Brij Behari Lal and others claiming to be her daughter's sons. This suit was decreed on the 29th September 1921 by the first Court on a finding that Mt. Badam Kunwar had a Hindu widow's interest in the property and had no authority to transfer it without legal necessity. Mt. Wahidunnisa's representative appealed to the High Court, but the decree of the first Court was affirmed on 16th April 1924. The possession of the property was finally delivered on 23rd August 1924. There is the dakhalnama printed on p. 101 which shows the delivery of possession with regard to a grove.

4. The plaintiff, who is the son and sole heir of Mt. Wahidunnisa, claims damages on account of the loss of this property in consequence of the suit brought by the daughter's son of Mt. Badam Kunwar.

5. Various defences were raised to this claim including the plea that the executants, the four ladies, were pardanashin ladies, and they had not executed the document after the same had been read over, explained to and understood by them. It was also urged that the claim was barred by limitation. The amount claimed as damages was also disputed and so was the claim as regards interest.

6. The learned Subordinate Judge has decreed the claim in part and has allowed interest up to the time of the suit but not thereafter. He has given the plaintiff half of the full costs. The defendants have preferred an appeal from his decree, and the plaintiff has filed cross-objections.

7. The four issues which were considered by the Court below were:

> (1) as to limitation;
> (2) as to Badam Kunwar being the absolute owner of the property,
> (3) as regards the vendors having understood and agreed to the deed and
> (4) as to the amount of damages. On behalf of the appellants the question of Badam Kunwar's absolute interest has not been raised in appeal. The main question of fact which has been argued is whether the ladies understood the covenant for title and quiet enjoyment and whether the same was binding upon them.

8. There was a clear plea raised in the written statement that the deed had not been read over, explained to or understood by the ladies, on which the Court framed a specific issue in the following words:

> Did the vendors understand and agree to the indemnity clause as it stands and what would be the vendors' liability under Section 55 Sub-clause (2)?

9. But the plaintiff did not offer any evidence on this point. He relied mainly on the admission by the defendants that the sale transaction had been agreed to by the ladies. But when one of the

defendants, Mt. Niamat Bibi, who was also one of the original executants, was being examined on commission, the cross-examination was directed to eliciting from her knowledge of the transaction. Muhammad Siddiq, who was her relation and the scribe of the sale deed of 1891, was also cross-examined on those lines. Although their evidence does lend support to the argument that Muhammad Siddiq was looking after the completion of the transaction, and it was he himself who had got the document registered, it is difficult to infer from this evidence that Muhammad Siddiq had been authorized by all the four ladies to settle not only the terms of the contract but all the conditions and covenants that were to be embodied in the sale deed, and that he had been appointed an authorized agent on behalf of all these ladies to bind them by his agreement, even though they themselves might not be made fully aware of all those conditions.

10. In the next place this question of authority was not suggested in the plaint and was certainly not the subject-matter of any issue that was framed for trial by the Court below. In the absence of the point being in issue it would be unjust and unfair to the other defendants in the case that they should be bound by statements made either by one of the defendants or a witness for them. The learned Subordinate Judge seems inclined to go a step further than even the learned advocate for the plaintiff, and has enunciated what he calls:

> a new principle for dealing with a, transfer purporting to have been made by "parda" ladies, namely that the Court should see to it that their relations who were looking after their interests in a particular transaction were satisfied of the propriety of the terms purporting to have been agreed to by the parda ladies.

11. This is a novel proposition which in face of the case law as it stands cannot possibly be accepted. Nor can we consider the case that Muhammad Siddiq was an agent authorized on behalf of all the ladies to eater into all the terms which were to be entered into the sale-deed so as to bind them, even though the deed was never read over to the ladies and never understood by them.

12. The learned advocate for the plaintiff has to concede that there is no positive evidence to show that the sale-deed was actually read over to the ladies and explained to them. On the other hand, there is definite evidence of Muhammad Siddiq and Niamat Bibi, even though it may possibly be untrue, to the effect that the deed was never read over to the ladies. In the present case there is this additional fact: that the deed was not presented for registration by the executants themselves so that there is not even an endorsement by the Sub-Registrar that the document was read over or explained to them. In the absence of such evidence we are bound to hold that the plaintiff has failed to discharge the initial burden which lay upon him to show that the deed was read over, explained to and understood by the ladies so as to bind them.

13. On this point there are numerous eases decided by their Lordships of the Privy Council which are binding upon us. We may only refer to the case of *Sajjad Husain v. Ahid Ilusain Khan* [1]where previous cases decided by their Lordships were referred to. The

[1][1912] 34 All. 455

same principle has been reaffirmed in subsequent cases, although it has been made clear that it is not always absolutely necessary to prove that there was also independent advice given.

14. If therefore the plaintiff had merely to depend on the specific covenant entered in the sale deed in order to establish his claim there would have been considerable difficulty in allowing it. But under Section 55, Transfer of Property Act, sub-C1. (2), the seller is deemed to contract with the buyer that the interest which the seller professes to transfer to the buyer subsists and that he has power to transfer the same. This presumption is absolute, and in the absence of a contract to the contrary is irrebuttable. Section 55, Sub-clause (g), also enjoins upon the seller the duty to give on being so required by the buyer or such person as he directs, such possession of the property as its nature admits. The defendants admit that the ladies understood that they were selling the property to Bishun Dat. The law presumes that in the absence of any contract to the contrary they did give warranty of title, and it was their duty to put the vendee in possession of the property. In spite of what Muhammad Siddiq has stated and he is an interested person, we hold that there is no satisfactory proof that the ladies or any agent on their behalf entered into any contract contrary to this presumption. As a matter of fact such an oral agreement would not be admissible in evidence, unless it were embodied in the deed itself: Section 92, Evidence Act.

15. The claim for recovery of damages is therefore undoubtedly maintainable, and the only question that remains for consideration is one of limitation and that of the amount of damages.

16. It has not been disputed before us that when Mt. Wahidunniea pre-empted the sale to Bishun Dat she stepped into the shoes of the vendees and assumed all this liabilities and became entitled to all the benefit which he was entitled to; and that therefore the present plaintiff can enforce a covenant for indemnity in the same way as Bishun Dat himself would have done. Indeed, Section 55, Sub-clause (2), in itself provides that the benefit of such contract shall be annexed to and shall go with the interest of the transferee, and may be enforced by every person in whom that interest is for the whole or any part thereof from time to time vested.

17. The learned Subordinate Judge has thought that the liability imposed by Section 55, Sub-clause (2), can be enforced only within three years being governed by Article 62 or Article 97, Lim. Act, and that in that event the suit would probably have been time barred. We are unable to agree with the view that Article 116 is inapplicable.

18. There has been some conflict of opinion on this point, and the learned Judges who have held Article 116 to be inapplicable have relied on the cases of *Hanuman Kamat v. Hanuman Mandur*[2] and *Juscurn Boid v. Pirthi Chand Lal*[3] But in none of these cases decided by their Lordships of the Privy Council did this point arise. Hanuman Kamat's case was one in which the sale deed containing the clause was of the year 1879 before the Transfer of Property Act came into force. Their Lordships therefore had not before them the consideration of the effect of Section 55, Sub-clause (2), Transfer of Property Act,

[2][1892] 19 Cal. 123

[3] A.I.R. 1918 P.C. 151

and that case cannot be treated as an authority on the legal effect of that
statutory provision. In the same way Hukum Chand's case was one in which the sale had not taken place under a private transfer, but it was an involuntary sale for arrears of rent under the Bengal regulations. The suit was one for recovery of the sale price and not for damages for breach of contract. There being no registered document in the case their Lordships had not to

consider the applicability of Article 116 at all. Thus both these cases are clearly distinguishable.

19. The learned advocate for the defendants has relied on the case of *Janak Singh v. Walidad Khan*[24] but there too the effect of Section 55(2) was not discussed in the judgment and does not appear to have been pressed before the Bench. The question which we have to consider is whether by virtue of this statutory provision a covenant for title cannot be read into the conveyance itself. Janak Singh's case [1915] 30 I.C. 410 was followed by this High Court in *Kundan Lal v. Bisheshar Dayal*[5], The learned Judges thought that the question for their consideration was concluded by Janak Singh's case [1915] 30 I.C. 410 as well as by Hanuman Kamat's case [1892] 19 Cal. 123 decided by the Lordships of the Privy Council. We have already pointed out the distinction. The last mentioned case, namely, *Kundan Lal v. Bisheshar Dayal*[6], was expressly dissented from by a Bench of this High Court in the case of *Hanumant Rai v. Chandi Prasad*[7],. The learned Judges thought that they were at liberty to accept the ruling in the case of *Mul Kunwar v. Chattar Singh*[8]in preference to that of Kundan Lal's case. AIR 1927 Allahabad 734 : (1928) ILR 50 All 95 : 103 Ind. Cas. 165 Although the case of Mul Kunwar [1908] 30 All. 402 was not directly in point inasmuch as there was an express covenant there, and not an implied covenant, there can be no doubt that the learned Judges in Hanumant Rai's case AIR 1929 Allahabad 293 : (1929) ILR 51 All 651 held that even in the case of an implied covenant, if the contract is under a registered document, Article 116 applies. We are in perfect agreement with their view.

20. As pointed out by them, Section 9, Contract Act, implies the existence of a contract where its completion by acceptance is implied. It may further be pointed out that Article 114 which is somewhat similar to Art, 116 and relates to unregistered contracts, refers to a contract whether it be express or implied. There is no reason to suppose that the contract mentioned in Article 116 may not be implied and must always be in express words. It therefore follows that if a statute lays down that a certain covenant should necessarily be implied in a certain contract and that contract itself is in writing registered, Article 116 would be applicable and the time begins to run from the date of dispossession. The observations of their Lordships of the Privy Council in the case of *Tricomdas Cooverji Bhoja v. Gopinath Jiu Thakur*[9] (of 44 Cal) go to suggest that Article 116 is not a mere residuary article, but is a special provision for registered instruments. It seems to us that when such a covenant is implied by law it is to be presumed to be a necessary accompaniment of the conditions of the sale and is therefore, deemed to be embodied in the deed of conveyance. The statute law has, so to say, added such a covenant to a registered conveyance unless there is an express contract to the

[4][1915] 30 I.C. 410 [6] AIR 1927 All734 : (1928) ILR 50 All 95 : 103 Ind. Cas. 165

[5] AIR 1927 All 734 : (1928) ILR 50 All 95 : 103 Ind. Cas. 165.

[7] AIR 1929 All 293 : (1929) ILR 51 All 651

[8][1908] 30 All.402 [9] A.I.R. 1916 P.C. 182 at p. 767

contrary. It would be incorrect to hold that the covenant is presumed only with regard to the contract of sale and not to the deed of sale. There is abundant authority in support of the view taken in the latest case of this Court and of the other High Courts in India. We may in this connexion briefly refer to the case of *Arunachala Ayyar v. T. Ramasami Aiyar*[10] and the case of *Municipal Council, Cochin v. Baru Devussi*[11], and also to the Calcutta case of *Injad Ali v. Mohini Chandra Adhikari*[12] and the Bombay cases of *Multanmal Jayaram v. Budhumal Kevalchand*[13], and *Ganappa Putta Hegde v. Hammad Saiba*[14], We may also point out that there is an analogous case of the Patna High Court in *Nabin Chandra Ganguli v. Munshi Mander*[15], where the

presumption arising under Section 108, Transfer of Property Act, was given a similar effect. Thus there is a considerable preponderance of authority in favor of the view that even in cases of implied covenants if the contract itself is registered, Article 116 is applicable. We see no good ground for making a departure from this abundance of authority.

21. In the case of void documents, particularly where the deed is not registered, it has been held that a suit to recover the amount paid is governed by Article 62. On the other hand, if the transfer was not void ab initio but was voidable and the consideration fails subsequently, then in the absence of a registered document Article 97 would cover a suit for recovery of the money for which the consideration failed. In the present case we have a registered document and have applied Article 116. Even if Article 116 were not applicable, the suit not being one for refund of the price paid, but for damages for the loss suffered, it may be a point worth considering whether the claim would be outside Article 97, and therefore, within the residuary Article 120. In either case we are clearly of opinion that the six years' rule of limitation applies and not the three years' rule. In this view of the matter the present suit was within six years of even the decrees of the first Court, under which the transfer was avoided.

22. But even if Article 97, Limitation Act, were applicable, the next question that would arise for consideration would be as to the starting point of limitation. Under that article three years run from the date of the failure of the consideration.

23. The learned advocate for the plaintiff relies strongly on the case of *Juscurn Boid v. Pirthichand Lal Choudhury* [16]*Hukum Chand Boid v. Pirthichand Lal Choudhury*[17] and has urged that the starting point of limitation must be the date of the first Court's decree. The case before their Lordships of the Privy Council was a peculiar case. Clause 14, Reg. 8, 1819, itself provided that an action would lie for the reversal of the sale on account of arrears of rent payable by a patni talukdar, and laid down that the purchaser should be made a party to such a suit and upon a decree passing for reversal of the sale, the Court should be careful to indemnify him against all loss, at the charge of the zamindar or person at whose suit the sale might have been made. Such a suit was not a suit for recovery of actual possession, but for reversal of the sale, and a decree to indemnify the aggrieved party had to be passed in the same suit. In their judgment their Lordships indicated:

[10][1914] 38 Mad. 1171
[12] A.I.R. 1924, p. 148
[11] AIR 1926 Mad 235 : 1925-22-LW 671
[13] AIR 1921 Bom 252 : (1921) 23 BOM LR 325 : 61 Ind. Cas. 70
[15] AIR 1927 Pat 248
[14] AIR 1925 Bom 440 : AIR 1925 Bom 196 : (1925) 27 BOM LR 637
[16] A.I.R. 1918 P.C. 151
[17][1915] 30 I.C. 410

> There may be circumstances in which a failure to get or retain possession may justly be regarded as the time from which limitation begins to run, but that is not the case here.

24. Their Lordships pointed out that the quality of possession acquired by the purchaser in that case excluded the idea that the starting point was to be sought in a disturbance of possession. This leading case has been considered by the Madras High Court in several cases. We may refer to the cases of *Subbaroya Reddiar v. Rajagopala Reddiar*[18] and *H.C.K.V. Sankara Variar v. R.K. Ummer*[19] and also *Mahomed Ali Sheriff v. Badharaju Venkatapathi Raju*[20] The learned Judges of that High Court have come to the conclusion that the starting point of limitation would be the date of dispossession where possession has been delivered. We may point out that this was the

view expressed in an earlier case of this High Court: *Ram Chandar Singh v. Tohfah Bharti*[21] In the case of an express covenant for quiet enjoyment there can be no doubt that the covenant is broken when possession is disturbed. But even under Section 55 there is not only a covenant for good title but also an obligation to put the vendee in possession of the property. So long as the vendee actually remains in possession and is in receipt of the profits he is getting some consideration for his money, and it is difficult to say that the consideration has already totally failed merely because a suit has been decreed against him. In England a distinction is drawn between a mere covenant for title and a covenant for enjoyment. In India the rights and liabilities of the parties are governed by the Contract Act and the Transfer of Property Act. Under Section 73, Contract Act, the party who suffers by breach of contract is entitled to receive compensation for the loss or damage which has been caused to him. A mere apprehended breach of covenant of title may not entitle him to a claim for damages when no loss has actually occurred; unless of course he could avoid the whole contract itself on the ground of fraud, misrepresentation or mutual mistake. It would also be inconvenient to hold that the breach was committed from the very start when the sale deed was executed in 1891. The English cases referred to fey the learned counsel for the appellants are mostly cases where there was an absolute defect of title ab initio. In the present ease the transfer was only voidable and not void and if acquiesced in by the reversioner or not challenged by him it would hold good. It is also clear that so long as the option to avoid was not exercised by the reversioner the transfer stood though it was liable to be defeated. The failure of consideration was only discovered when the claim was put forward on behalf of the reversioner. In the peculiar circumstances surrounding a transfer by a Hindu lady who has a restricted power of alienation, it would be inadvisable to import the considerations which affect the English law of immovable property. Following the cases referred to above, we should hold that the total failure of consideration took place on 23rd August 1924 when the plaintiff was actually dispossessed by the reversionary heir. In the view of the matter also the claim would be within time.

25. The question that arises for consideration is the measure of damages. It is urged on behalf of the appellants that the plaintiff is only entitled to a refund of the proportionate amount of the original consideration, and not the present market value of the property. On behalf of the plaintiff-respondent reliance is placed on the case of *Jai Kishen Das v. Arya Priti Nidhi Sabha*[22] in which certain earlier cases have been referred to, which lay down

[18][1915] 38 Mad. 887 [20][1920] 60 I.C. 235 [22][1920] 1 Lah. 380
[19] A.I.R. 1923 Mad. 46 [21][1904] 26 All. 519

that the measure of damages is the price of the land at the date of eviction.

26. As the suit is really not a suit for recovery of the original price, because the consideration did not fail from the very beginning, but is for damages for the loss suffered by the plaintiff on account of the breach of the contract the measure of damages should be the extent of the loss suffered by the plaintiff. The real loss to him is the loss of the property, that is to say, its going out of his possession in 1924. In order to compensate him fully and put him in a position, as if he had suffered no loss whatever, one would have to deliver to him another property of the same value as that which he has lost. It therefore, follows that the measure of the loss to him is the market value of the property at the time when it goes out of his possession. It would be both inequitable and unjust to base the amount of damages on the price paid in 1891, for since that

year the situation has considerably changed. On the one hand the plaintiff's predecessor parted with her money and has not been receiving any interest. On the other hand, the plaintiff has been in possession of the property and receiving its profits; but he might also have improved the lands by further investments as well as by his labour, and the price of the land has undoubtedly increased in consequence of the general rise in prices all round. If the plaintiff's predecessor had been given some other land, to which the title was not defective, that property also would have risen in value to the same extent as the property which he has now lost. In view of all these circumstances, we are of opinion that the equitable method would be to uphold the decree of the Court below, under which damages have been assessed at the present market value.

27. No serious objection can be taken to the estimate of the valuation. The learned Judge has taken three per cent as the rate for capitalizing the amount of profits, and in our opinion that rate is not unfair.

28. We may point out that there was at first a misapprehension in the mind of the learned advocate for the appellants when it was urged before us that the Court below has given the plaintiff the full value of four annas share in the three villages, and not only the proportionate interest of the four ladies in those tour annas, that is to say, 28/80 of four annas. On an examination of the shara mentioned in the schedule attached to the plaint and the value of the property in the decree of suit No. 885, 1920, it is now made clear that there is no such mistake.

29. The cross-objections raised three points. The first is that the Court below should have given to the plaintiff a decree for the costs incurred in the appellate Court also. The learned Subordinate Judge has thought that after the adjudication by the first Court the position was made perfectly clear to the plaintiff, and when he took the matter up in appeal, he took it there at his own risk. He has accordingly disallowed the costs of the appellate Court, and we do not think that he was wrong in this respect,

30. The second ground is that the plaintiff was entitled to his full costs. The learned Subordinate Judge has given the plaintiff half of his full costs. We think that it would be fair to both parties to direct that they should receive and pay costs in proportion to success and failure in both Courts.
31. The learned Subordinate Judge has not given any pendente lite of future interest. As the claim was one for damages, and the amount of the loss suffered by the plaintiff was adjudged at the time of the judgment by the Court, we think that no further interest pendente lite should be allowed. But at the same time there seems to be no reason why the plaintiff should not have his ordinary interest at the Court rate of six per cent per annum on the amount of the decree till payment. We accordingly dismiss the appeal and allow the cross objection to this extent: that we modify the decree for the amount of damage decreed by the Courts below and direct that the same should carry future interest at the rate of six per cent per annum.

32. The parties would receive and pay costs in proportion to their success and failure.

.